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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FREDY CASTANEDA-LONGORIA, Defendant and Appellant.	A150173 (Contra Costa County Super. Ct. No. 5-160898-3)

While using his pickup truck to "spin doughnuts" in a residential neighborhood of Antioch, defendant Fredy Castaneda-Longoria hit Timothy Hudson, dragged him about 50 feet, and ran over him while fleeing the scene.[1] Hudson died from his injuries. A jury convicted Castaneda-Longoria of felony counts of gross vehicular manslaughter and hit-and-run driving resulting in death and found true the allegations that he fled the scene of the first crime and caused great bodily injury during the second crime. The trial court sentenced him to 11 years in prison.

On appeal, Castaneda-Longoria makes numerous claims of evidentiary, instructional, and sentencing error, including cumulative error.[2] We conclude that an

[1] Spinning doughnuts entails purposely spinning a vehicle in a circle, causing its tires to break traction.

[2] Because we do not resolve any of Castaneda-Longoria's claims of error on the basis that they were forfeited, we need not address his contentions that his trial counsel rendered ineffective assistance by failing to raise appropriate objections.

order of victim restitution to Hudson's parents must be reversed for lack of evidence. Otherwise, we affirm the judgment.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Hudson, who was 47 years old at the time of his death in May 2015, lived with his parents in their Antioch home. In recent years, an increasing number of commuters used a side street to cut through the Hudsons' neighborhood, often at high speed. "Kids" would sometimes spin doughnuts in intersections along that street, including the intersection in front of the Hudsons' home. It was common for residents to run outside when they heard a vehicle spinning doughnuts to try to stop it, and they were used to watching out for that activity. The police had "come out quite a few times" to observe these problems and had advised residents to photograph offending vehicles.

On May 11, 2015, at around 5:30 p.m., Hudson and his parents heard "a motor racing" and "tires slipping around, squealing," which they recognized as the sound of a vehicle spinning doughnuts. Hudson, who was about six feet tall and over 260 pounds, had just gotten out of the shower and was preparing to go to work. He threw on his boots and a baseball cap and went outside.

A neighbor also heard the sound of a vehicle spinning doughnuts and went to his window to take a picture. He testified that he saw a red Ford pickup truck, "as it was moving out of the spin, strike [Hudson], and [Hudson] fall down to the side of [the] truck, [and] the truck hit him and drag[] him underneath." The neighbor stated that the front passenger's side of the truck hit Hudson, and it appeared to him that "there was no way somebody that was driving could have missed a person standing in the road." The truck accelerated as it dragged Hudson, and the neighbor yelled, " '[S]top.' " The truck, whose driver's-side window was open, then "sort of [did] a little hop as it ran over [Hudson]" and drove away quickly. The neighbor called 911.

Within seconds, Hudson's father also went outside and saw a red Ford pickup truck stopped in the road. Then, he testified, "the truck drove off, and I heard a bump.

The truck ran over [Hudson]. And then I could see his legs on the sidewalk through the break in the hedge." Hudson's father stated that the truck "took off like a bat out of hell." Two other neighbors also ran outside in time to see a red Ford pickup truck leaving the scene at a high rate of speed.

Hudson was lying on the street and appeared "dazed." He had "extreme road rash," "[h]is head was split" and "one of his eyes was hanging out," and his pants had been torn from his body. His cap and one of his boots were lying in the street about 45 feet away from him. There were circular tire-friction marks in the intersection where he was hit, approximately 30 feet from the curb. His jeans had left blue markings on the road, and there was a 50-foot-long drag mark from the circular marks to where he was found.

An Antioch police officer took a short statement from Hudson while he was being treated at the scene, and a recording of the statement was played for the jury. Hudson said that he heard someone spinning doughnuts, went outside "to try to tell them to stop," and entered the street. He indicated that the driver hit him while still spinning doughnuts and did not "come out at" him.

Another police officer was on patrol when he heard dispatch report a red truck was involved in a hit and run at a nearby intersection. As the officer was heading toward the intersection, he saw a red Ford pickup truck traveling toward him. The officer tried to make eye contact with the truck's driver, whom he later identified as Castaneda-Longoria. Castaneda-Longoria "looked very nervous" and "would not look directly at [him]," but the officer did not immediately pull him over. After receiving more specific information from dispatch and realizing Castaneda-Longoria's vehicle matched the description of the suspect vehicle, the officer soon located the truck in a grocery store's parking lot. It was empty and "parked crooked in a parking stall." A later inspection of the truck confirmed it was in good operating condition.

The police took the neighbor who had called 911 to the parking lot, where he identified the pickup truck as the one he had seen run over Hudson. The neighbor pointed out to the police that there was "hair and blood" on the underside of the truck.

The two other neighbors who had run outside as the truck sped away later identified Castaneda-Longoria in a photographic lineup.

Another police officer was dispatched to the address of the pickup truck's registered owner, Castaneda-Longoria's father. Castaneda-Longoria, who was 19 years old at the time, was upstairs "sitting on the ground" next to his mother and crying. Castaneda-Longoria had not called 911 or otherwise tried to help Hudson.

Hudson was transported to a hospital and died in surgery. The forensic pathologist who performed his autopsy testified that Hudson had bruising and numerous abrasions and lacerations all over his body, including tread marks on his chest and a large cut on his forehead. His skull, pelvis, and ribs had been fractured, and there was "blood in each chest cavity" due to the rib fractures. His liver was "almost pulpified," a "very severe injury," and his spleen had a tear. The pathologist testified that Hudson's injuries were aggravated because he was dragged and that he might have survived had the driver stopped after first hitting him.

The jury convicted Castaneda-Longoria of gross vehicular manslaughter and found true the allegation that he fled the scene of the crime. It also convicted him of hit-and-run driving resulting in death and found true the allegation that he inflicted great bodily injury during the offense.[3] The trial court sentenced him to 11 years in prison, composed of the upper term of six years for gross vehicular manslaughter, a consecutive five-year term for the accompanying enhancement for fleeing the scene, and a concurrent three-year term for hit-and-run driving. A three-year term for the great-bodily-injury enhancement was imposed and stayed.

[3] Castaneda-Longoria was convicted under Penal Code section 192, subdivision (c)(1) (gross vehicular manslaughter) and Vehicle Code section 20001, subdivision (b)(2) (hit-and-run driving), and the enhancement allegations were found true under Vehicle Code section 20001, subdivision (c) (fleeing the scene) and Penal Code section 12022.7, subdivision (a) (great bodily injury). All further statutory references are to the Penal Code unless otherwise noted.

II.
DISCUSSION

A. The Trial Court Did Not Err by Admitting Evidence of Third-party Driving.

Castaneda-Longoria claims that evidence of bad driving by others in Hudson's neighborhood should have been excluded as irrelevant and unduly prejudicial under Evidence Code section 352 (section 352). The court did not err.[4]

1. Additional facts.

While discussing potential questions for voir dire, the prosecutor noted that "there had been problems with people speeding in the area before this," it was a "sore subject" among the neighbors, and Hudson "went out in the street to try to stop the behavior." Castaneda-Longoria's trial counsel then stated that he had not been "aware that there [were] going to be proffers about prior people driving poorly in this neighborhood" and asked that such evidence be excluded. The trial court deferred ruling on the issue.

At a later hearing, after Castaneda-Longoria's counsel raised the issue again, the prosecutor explained that she sought to introduce "very general background" that would explain why Hudson went into the street and would not imply that Castaneda-Longoria was a participant in any of the previous bad driving. Defense counsel moved to exclude the evidence as irrelevant and unduly prejudicial under section 352, because it "could lead a jury to want to do, quote, 'justice' for the community, whether or not Mr. Castaneda-Longoria was the person who had been driving up and down the street too fast on prior days."

The trial court denied the defense's motion, determining that the evidence would not "create undue prejudice or be confusing to the jury" so long as the prosecutor did not attribute any of the conduct to Castaneda-Longoria. At trial, several witnesses testified about the previous bad driving in the neighborhood, as a means of explaining not only

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[4] Castaneda-Longoria also argues that the evidence's admission violated his due process right to a fair trial, but the claim fails because we reject his claim of state-law error. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1289; *People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1106.)

Hudson's actions but also their own ability to recognize the noise of a vehicle spinning doughnuts.

2. Discussion.

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Even if evidence is otherwise relevant and admissible, under section 352 it may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352; *People v. Scott* (2011) 52 Cal.4th 452, 490.) The "prejudice" section 352 refers to "is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Rather, it " 'applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.' " (*Ibid.*) We review the trial court's evidentiary rulings for an abuse of discretion. (*People v. Harris* (2005) 37 Cal.4th 310, 337 (*Harris*).)

Castaneda-Longoria argues that the evidence about third-party driving was irrelevant because "[w]hy . . . Hudson or the other witnesses came out of their homes did not matter . . . in determining if . . . [he] was grossly negligent." Even assuming that Hudson's or the neighbors' reasons for coming outside were irrelevant in and of themselves, we agree with the Attorney General that the challenged evidence bore on other significant issues. For example, it helped to explain why the neighborhood residents were able to recognize the sound of a vehicle doing doughnuts, which in turn tended to prove that Castaneda-Longoria was engaged in dangerous behavior before he hit Hudson. It also corroborated the evidence that residents went outside quickly, which in turn supported the conclusion that the vehicle spinning doughnuts was the same truck that hit Hudson.

Castaneda-Longoria also contends that the trial court erred by not excluding the evidence of third-party driving under section 352, because its "relevance was readily

outweighed by its prejudicial emotional content." He claims that the testimony "was likely to trigger emotional sympathy for the victim and the neighbors . . . and induce jurors to want to give 'justice' to that community." In support, he points to decisions in DUI murder cases concluding that evidence about other drunk-driving tragedies should have been excluded under section 352 because it "created a substantial danger of inflaming the jury's passions by engendering . . . feelings of sympathy for the victims of the charged offenses and their families." (*People v. Diaz* (2014) 227 Cal.App.4th 362, 380; accord *People v. Covarrubias* (2015) 236 Cal.App.4th 942, 950.) The evidence in those cases, however, involved "vivid descriptions" of drunk-driving accidents and their aftermath that "were wholly unrelated" to the charged offenses. (*Covarrubias*, at p. 950; *Diaz*, at p. 380.) Here, in contrast, the challenged evidence did not concern previous "tragedies" and was unlikely to evoke a similar level of sympathy. Moreover, the witnesses who testified about unsafe driving in their neighborhood were percipient witnesses to the charged crimes, not just random people harmed by unsafe driving.

Castaneda-Longoria also relies on decisions addressing what he describes as the "analogous problem" of prosecutors trying to induce juries to sympathize with victims and their families or to serve justice for the community. For example, in *People v. Vance* (2010) 188 Cal.App.4th 1182, Division Two of this court held that a prosecutor committed misconduct by "invit[ing] the jury to put itself in the [murder] victim's position and imagine what the victim experienced." (*Id.* at p. 1188; see also *People v. Cash* (2002) 28 Cal.4th 703, 729 [evidence that attempted-murder victim was in early stages of pregnancy "clearly irrelevant to any issue in the case"].) Again, however, the third-party driving evidence did not involve similar harm to Hudson or his neighbors. The previous bad driving in the neighborhood may have been distressing, but its consequences paled in comparison to the consequences of Castaneda-Longoria's acts. Given this evidence's higher degree of relevance and lower potential for evoking sympathy in the jury, we conclude that the trial court did not abuse its discretion by admitting it.

B. Evidence of Previous Bad Driving by Castaneda-Longoria Was Properly Admitted.

Castaneda-Longoria also claims that the trial court erred by admitting the evidence of his own previous bad driving because it was irrelevant and unduly prejudicial under section 352, rulings we again review for an abuse of discretion. (*Harris, supra*, 37 Cal.4th at p. 337.) We conclude there was no error.

1. Additional facts.

Before trial, Castaneda-Longoria sought to exclude evidence that he crashed into a house in January 2014 and was pulled over for speeding in May 2014. He argued that his previous conduct was not sufficiently similar to the charged conduct to be admissible under Evidence Code section 1101, subdivision (b) to prove his knowledge of the riskiness of his behavior. He also argued that the evidence was unduly prejudicial under section 352, particularly photographs of the crash showing extensive damage, and that the evidence's admission would violate his due process rights.

The trial court ruled that evidence about the previous incidents was admissible to prove Castaneda-Longoria's "knowledge that the conduct at issue, dangerous or reckless driving, was dangerous." The court also concluded that the evidence was not unduly prejudicial and noted its intention to instruct the jury on the evidence's admission for a limited purpose and allow only a few pictures of the crash to be introduced.

As to the house-crash incident, an Antioch resident testified that in January 2014, he was working at his computer around midnight in a room at the front of his house. The power went out, and he heard a "[r]eally, really loud" noise. He ran outside to see that his garage door was gone and the garage was "wide open." In addition, the windows of the neighboring house were "all cracked," and a car was flipped over on his neighbor's lawn. The car had hit a PG&E box that diverted the car toward his garage, which was the only reason the vehicle had not crashed into the front bedroom where his wife was sleeping. The evidence suggested that Castaneda-Longoria had been going about 15 miles per hour above the speed limit and had hit the median, causing his vehicle to cut across the road.

As to the speeding incident, a California Highway Patrol officer testified that early on a Saturday morning in May 2014, he pulled over Castaneda-Longoria on Highway 24 in Orinda and cited him for speeding. The officer had measured the vehicle's speed at 96 miles per hour in a zone where the speed limit was 65 miles per hour.

2. Discussion.

Castaneda-Longoria first argues that the trial court erred by admitting the evidence of these prior incidents to prove knowledge because subjective knowledge is irrelevant to whether a defendant acted with gross negligence, the required mental state for gross vehicular manslaughter. The conviction for that crime was under section 192, subdivision (c)(1), which prohibits in relevant part "driving a vehicle in the commission of an unlawful act, not amounting to a felony, and with gross negligence." "Gross negligence," in turn, "is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. [Citation.] 'The state of mind of a person who acts with conscious indifference[] to the consequences is simply, "I don't care what happens." ' [Citation.] The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved." (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036 (*Bennett*).)

As the Attorney General points out, our state Supreme Court has rejected the claim that a defendant's prior experiences are irrelevant to the issue of gross negligence because the test is objective. In *People v. Ochoa* (1993) 6 Cal.4th 1199 (*Ochoa*), the defendant claimed that evidence of his prior DUI conviction and attendance of "an alcohol awareness class discussing the dangers of drinking and driving" was inadmissible because "evidence of his own subjective state of mind was irrelevant" to whether he acted with gross negligence. (*Id.* at p. 1205.) The Court disagreed, explaining, "In determining whether a reasonable person *in defendant's position* would have been aware of the risks, the jury should be given relevant facts as to what defendant knew, including his actual awareness of those risks. True, . . . defendant's *lack* of such awareness would not preclude a finding of gross negligence if a reasonable person would have been so aware. But the converse proposition does not logically follow, for if the evidence showed

that defendant *actually appreciated the risks* involved in a given enterprise, *and nonetheless proceeded* with it, a finding of gross negligence (as opposed to simple negligence) would be appropriate whether or not a reasonable person in defendant's position would have recognized the risk." (*Ibid.*)

Castaneda-Longoria suggests that we are not bound by *Ochoa* because "[t]he 'primary issue' in [that case] was the sufficiency of the evidence to support the conviction, not the evidentiary question." (Quoting *Ochoa*, *supra*, 6 Cal.4th at p. 1206.) But the Supreme Court discussed the evidentiary issues at length, drawing a dissent, and concluded that "the Court of Appeal majority's analysis [was] flawed" and "the challenged evidence was properly admitted at trial." (*Id.* at pp. 1205-1206; see *id.* at p. 1209 (dis. opn. of Panelli, J.).) Indeed, Castaneda-Longoria admits that the Court's discussion appears to be "more than dicta," and he does not explain how we are nevertheless free to disregard the Court's resolution of the evidentiary issues. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Castaneda-Longoria also requests that if we "feel[] bound" by *Ochoa*, we "recommend the Supreme Court reconsider [its] logic and conclusion." We decline to do so. Even if we were otherwise inclined to sympathize with Castaneda-Longoria's position, his subjective knowledge was relevant to issues in the case other than gross negligence. He was charged with three possible predicate offenses to support a conviction of gross vehicular manslaughter based on "driving a vehicle in the commission of an unlawful act, not amounting to a felony" (§ 192, subd. (c)(1)), one of which was reckless driving under Vehicle Code section 23103, subdivision (a). That statute prohibits driving a vehicle "in willful or wanton disregard for the safety of persons or property." (Veh. Code, § 23103, subd. (a).) Accordingly, the jury was instructed under CALCRIM No. 2200 on reckless driving, which provides that "[a] person acts with wanton disregard for safety when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, and (2) he or she intentionally ignores that risk"—a *subjective* test, to which Castaneda-Longoria's own knowledge was relevant.

(See *People v. Schumacher* (1961) 194 Cal.App.2d 335, 338-339.) Thus, his claim that the evidence was irrelevant fails regardless of *Ochoa*.[5]

Castaneda-Longoria also argues that the trial court should have excluded the evidence of his previous bad driving as unduly prejudicial under section 352. He claims that upon "[l]earning [he] had driven badly in the past and was not prosecuted, some jurors would be inclined to punish him for those acts, without due attention to the demands of 'gross negligence.' " We disagree. Although his mind state was disputed, it was essentially uncontested that he hit Hudson while spinning doughnuts, dragged him, and ran over him while fleeing the scene. We find it difficult to accept that the jury was pushed to convict Castaneda-Longoria of the killing merely to punish him for previously speeding and damaging a house, acts that were significantly less serious. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 534.) The court did not abuse its discretion by admitting the evidence of the previous two incidents.

C. The Trial Court Did Not Err by Excluding Evidence of Hudson's Drug Use and Prior Convictions.

Castaneda-Longoria next claims that the trial court erroneously excluded evidence that Hudson was under the influence of controlled substances at the time he died and had prior felony convictions. We are not persuaded.

1. Evidence of Hudson's intoxication.

The prosecution moved in limine to exclude evidence that Hudson "had drugs in his system at the time of his death," including methamphetamine and THC, on the basis

[5] Castaneda-Longoria also suggests in passing that even if his subjective knowledge was otherwise relevant, neither of the previous incidents "would educate him that driving at a much slower speed doing doughnuts at a wide and empty intersection posed a high risk of death to others." He offers no authority to support this claim, however, and we conclude that the prior bad driving, particularly the crash, was sufficiently similar to permit the inference that he understood the risks of careless driving and disregarded them. (See *People v. Hendrix* (2013) 214 Cal.App.4th 216, 241-242 ["While prior similar driving conduct and other similar circumstances would enhance the probative value, other crimes evidence may be admissible [to prove knowledge of the consequences of dangerous driving] even though similar only in a general way"].)

that a victim's negligence is not a defense to gross vehicular manslaughter. The trial court excluded the evidence under section 352, ruling that it could confuse the jury "since contributory negligence is not a defense in this case"; would require an undue consumption of time given the lack of clarity about what expert witnesses might testify about the drugs' role in Hudson's death; and was unduly prejudicial because it "creat[ed] a bias against the decedent" while having "close to zero probative value."

Castaneda-Longoria claims that the challenged evidence was relevant because it demonstrated "the likely reason that . . . Hudson acted irrationally in running into the street into the path of the pickup," which was in turn relevant because it created an issue "whether a reasonable person would anticipate a person would run into the path of [his or her] car, threatening [the other person's] own life." (Emphasis omitted.) He contends that absent the information about drugs in Hudson's system, "some jurors might be loath to attribute any blame [to Hudson] for his own death."

Initially, we note that there is not enough information in the record to evaluate what the challenged evidence would have actually shown about Hudson's level of intoxication. The toxicology report is not in the record, and the defense, which did not plan to call its own expert witness on the issue, made no proffer as to what effect the amount of drugs in Hudson's system may have had on his behavior.[6] As a result, it is far from clear that the evidence would have shown that Hudson's acts were the product of drug impairment.

In any case, even if we were to accept that the defense could have established that Hudson went into the street because he was intoxicated, Castaneda-Longoria's arguments would not persuade us. Castaneda-Longoria fails to explain why the reason that Hudson went into the street matters. It was undisputed that Hudson put himself in danger by doing so, and whether he entered the street because he was intoxicated, was angry about

[6] Castaneda-Longoria purports to summarize the toxicology report in his brief, but he does not cite to any portion of the record where it can be found. Even if we could otherwise properly consider this information, we are not in a position to evaluate the significance of the levels of various drugs in the system of a person of Hudson's size.

the bad driving in the neighborhood, or for some other reason does not affect whether Castaneda-Longoria could have reasonably anticipated Hudson's actions. Indeed, as the trial court correctly ruled, "[t]he conduct of the victim . . . , whether negligent or even criminally proscribed, is not, in itself, a defense to crime," and the reasonableness of the victim's behavior is not an element of gross vehicular manslaughter. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46 (*Schmies*).) Castaneda-Longoria fails to demonstrate that Hudson's intoxication bore on any other disputed material issue, and a trial court "is not required to admit evidence that merely makes the victim of a crime look bad." (*People v. Kelly* (1992) 1 Cal.4th 495, 523.) There was no abuse of discretion. (See *Harris*, *supra*, 37 Cal.4th at p. 337.)

2. Hudson's prior convictions.

The prosecution also moved to exclude Hudson's 1996 felony convictions for manufacturing methamphetamine and possessing methamphetamine for sale, which the defense sought to admit to impeach his credibility as it bore on his statements at the scene. The trial court excluded the prior convictions under section 352. In doing so, it concluded that their prejudicial effect outweighed their probative value, because they were remote and it was "clear" that Hudson did not have "an opportunity for reflection or fabrication" when making his dying declaration.

We begin by accepting Castaneda-Longoria's position that evidence of the convictions could have been properly admitted to impeach Hudson. (See *People v. Brooks* (2017) 3 Cal.5th 1, 51-52.) We disagree, however, that the trial court abused its discretion by excluding the evidence under section 352. In determining whether to admit evidence of a prior felony conviction to impeach a witness's testimony, "the prominent factors in determining the probative value of the prior conviction include 'whether the conviction (1) reflects on honesty and (2) is near in time.' " (*Brooks*, at p. 52.) Here, although Hudson's conduct involved moral turpitude because it related to the sale of drugs (see *Harris*, *supra*, 37 Cal.4th at p. 337), the convictions were almost 20 years old and, contrary to Castaneda-Longoria's claim otherwise, would certainly have tended to create an "emotional bias" against Hudson. The court did not abuse its discretion by

determining that the evidence's slight probative value was substantially outweighed by the danger of undue prejudice.

Castaneda-Longoria also claims that the trial court's ruling violated his federal and state constitutional rights to confront witnesses and present evidence. A defendant "has a constitutionally guaranteed right to confront and cross-examine the witnesses against him or her. [Citations.] The right of confrontation is not absolute, however, and may 'in appropriate cases' bow to other legitimate interests in the criminal trial process." (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.) In particular, our state Supreme Court has repeatedly rejected Confrontation Clause challenges to the admission of dying declarations. (*People v. Johnson* (2015) 61 Cal.4th 734, 761-762 [discussing cases].) Castaneda-Longoria does not contest that the trial court properly admitted Hudson's statement as a dying declaration, and he does not explain how the exclusion of the prior-conviction evidence could amount to a Confrontation Clause violation when the admission of a dying declaration without any opportunity for cross-examination does not.

As to the other aspect of Castaneda-Longoria's constitutional claim, a defendant also "has a due process right to present evidence material to his [or her] defense so long as the evidence is of significant probative value. [Citation.] However, . . . a defendant has no constitutional right 'to present *all* relevant evidence in his [or her] favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using . . . section 352.' " (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 450, italics added.) Castaneda-Longoria fails to demonstrate how the impeachment evidence was material to his defense. In his dying declaration, Hudson said that he saw a truck doing doughnuts, he went into the street to tell the driver to stop, the truck hit him while it was still doing doughnuts, and the truck did not stop before hitting him. Castaneda-Longoria does not explain which parts of Hudson's statement he sought to impeach, and it is unclear what the defense could have hoped to gain by calling Hudson's veracity into question. If anything, Hudson's statement corroborated the defense position on key points, including that Castaneda-Longoria did not intend to hit the other man. There was no constitutional error in the exclusion of the prior-conviction evidence.

D. A Police Officer's Testimony that Spinning Doughnuts Constitutes Reckless Driving Was Harmless.

Castaneda-Longoria also contends that the trial court erred by permitting a prosecution witness to testify that doing doughnuts is "very dangerous" and constitutes reckless driving. We conclude that any error was harmless.

At trial, an Antioch police officer described what "spinning doughnuts" meant and testified that it was a common activity in Antioch. The officer also responded affirmatively when asked whether, "from [his] training and experience," spinning doughnuts is "very dangerous." Castaneda-Longoria moved to strike this testimony on the basis that it called for a legal conclusion, and the trial court overruled the objection. The officer then testified that he had witnessed crashes caused by people spinning doughnuts. Finally, he testified, without objection, that if he saw someone spinning doughnuts, he would cite or arrest the person for reckless driving in violation of Vehicle Code section 23103, subdivision (a).

Castaneda-Longoria argues that because reckless driving under that statute was alleged as a predicate offense to support the charge of gross vehicular manslaughter, the officer's testimony that spinning doughnuts would subject someone to arrest for reckless driving was an improper legal conclusion. His point is well-taken. "The definition of a statutory term," including what activity constitutes a particular crime, is "not a subject for opinion testimony." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45-46.) And even if we were to accept the People's position that the officer testified as an expert, despite not being qualified as such, the Attorney General fails to convince us that the challenged opinion was a proper subject of expert testimony. Although the Attorney General is correct that witnesses may offer an opinion that "embraces the ultimate issue to be decided by the trier of fact" (Evid. Code, § 805), this principle "does not bestow upon an expert carte blanche to express any opinion he or she wishes. [Citation.] There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.)

We need not ultimately determine whether the challenged testimony should have been excluded, however, because any error was harmless. As we have said, "reckless driving" is defined as driving on a public road "in willful or wanton disregard for the safety of persons or property." (Veh. Code, § 23103, subdivision (a); see *id.*, § 360.) Even assuming that the officer's opinion was improper, other "properly admitted evidence supported every element" of reckless driving, as it was undisputed that Castaneda-Longoria was spinning doughnuts on a residential street during evening commute hours. (*People v. Torres*, *supra*, 33 Cal.App.4th at p. 49.) Accordingly, he cannot demonstrate a reasonable probability that he would have received a more favorable verdict had the challenged testimony been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *Torres*, at p. 49.)

E. The Claims of Instructional Error Lack Merit.

Castaneda-Longoria raises four claims of error involving the jury instructions on gross vehicular manslaughter. "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) " ' " '[T]he correctness of jury instructions is to be determined from the entire charge of the [trial] court, not from a consideration of parts of an instruction or from a particular instruction,' " ' " and " '[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions.' " (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1378.) " 'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant.' " (*People v. Solomon* (2010) 49 Cal.4th 792, 822.) We review claims of instructional error de novo. (*Fiore*, at p. 1378.)

1. No error appears in the special instruction on contributory negligence.

Castaneda-Longoria first claims that the trial court erred by instructing that any contributory negligence by Hudson was not a defense to gross vehicular manslaughter without clarifying that Hudson's actions were still relevant to the issue of gross

negligence. In giving CALCRIM No. 592, the general instruction on this crime, the court added the following language: "Contributory negligence of a pedestrian, contributing to death when struck by an automobile, is no defense in a vehicular manslaughter prosecution." This language reflects the general principle that " 'contributory negligence,' " including on the part of a victim, " 'is not available as a defense or excuse for crime.' " (*Schmies, supra*, 44 Cal.App.4th at p. 46.) Rather, whether a party other than the defendant has acted reasonably "is at best an evidentiary matter which can have relevance only to the extent that it tends to prove or disprove an element of the crime or a recognized defense thereto." (*Ibid.*)

Castaneda-Longoria argues that the challenged instruction could have misled jurors to believe that in evaluating whether he acted in a way that a reasonable person would have known created a high risk of death or great bodily injury, as required to support a conviction of gross vehicular manslaughter, they could not consider Hudson's conduct. Castaneda-Longoria acknowledges that gross negligence is an objective standard, however, and does not explain how Hudson's conduct, negligent or not, bore on whether it was objectively apparent that spinning doughnuts under the given circumstances—*before* Hudson entered the road—posed a deadly risk. "Foreseeability of harm . . . is a recognized factor to be considered in determining whether the defendant acted with gross negligence," but as to this element of the crime "the focus is upon foreseeability of danger to life in a broad or overall sense rather than foreseeability of the particular manner in which death occurred."[7] (*Schmies, supra*, 44 Cal.App.4th at p. 46 & fn. 4.)

To the extent that Hudson's conduct had any bearing on whether Castaneda-Longoria acted with gross negligence, we also agree with the Attorney General that the jury was permitted to consider the defense's position that Castaneda-Longoria "had extensive control over his driving while spinning doughnuts in a large and relatively safe

[7] We express no view on what bearing, if any, Hudson's conduct had on the issue of causation, and Castaneda-Longoria does not argue that the challenged instruction was confusing as to that issue.

intersection" and that it was unforeseeable someone would run into the vehicle's path. Specifically, at Castaneda-Longoria's request, the trial court also added the following language to its general instruction on gross vehicular manslaughter: "A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer." This language, which is based on "the doctrine of 'imminent peril' " (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269-270), informed the jury that if it concluded Castaneda-Longoria's conduct in spinning doughnuts was not negligent, it did not become so merely because he could have better responded to Hudson's unexpected appearance. Considering the court's charges as a whole, we perceive no error in the instruction on contributory negligence.

2. No further instruction on the role of predicate offenses in establishing gross negligence was required.

Castaneda-Longoria also claims that the trial court erred by failing to instruct that the mere fact he had committed a predicate offense " 'is insufficient in itself to constitute gross negligence.' " (Emphasis omitted.) He relies on *Bennett*, in which the Supreme Court addressed an instruction given where the crime charged was gross vehicular manslaughter while driving under the influence. (*Bennett*, *supra*, 54 Cal.3d at p. 1035.) In clarifying that a jury could "base its finding of gross negligence on evidence of the defendant's overall circumstances of intoxication," even though it could not rely on the fact of the defendant's intoxication alone, the Court stated that an ideal instruction would read, " 'The mere fact that a defendant drives a motor vehicle while under the influence of alcohol and violates a traffic law is insufficient in itself to constitute gross negligence. You must determine gross negligence from the level of the defendant's intoxication, the manner of driving, or other relevant aspects of the defendant's conduct resulting in the fatal accident.' " (*Id.* at pp. 1038-1039.)

Bennett and other cases involving the principle that intoxication alone does not constitute gross negligence are inapposite. The jury instruction on gross vehicular

manslaughter while intoxicated given in *Bennett*, CALJIC No. 8.93, stated that the elements of that crime were (1) driving while intoxicated, (2) committing with gross negligence an additional unlawful act, " 'namely a violation of the maximum speed law or basic speed law,' " and (3) causing death through that act. (*Bennett, supra*, 54 Cal.3d at p. 1039; CALJIC No. 8.93.) Thus, as *Bennett* determined, without clarification jurors could have concluded that the defendant's intoxication satisfied not only the first element but also the mind state for the second element—i.e., that performing the additional unlawful act while intoxicated was grossly negligent.

Here, in contrast, the instruction on gross vehicular manslaughter cannot be reasonably interpreted to allow a finding of gross negligence based merely on the commission of a predicate offense. The jury was instructed that to find Castaneda-Longoria guilty of this crime, it had to find the following elements: "1. The defendant drove a vehicle; [¶] 2. While driving that vehicle, the defendant committed a misdemeanor or infraction that might cause death; [¶] 3. The defendant committed the misdemeanor or infraction that might cause death *with gross negligence*; [¶] AND [¶] 4. The defendant's grossly negligent conduct caused the death of another person." (Italics added.) The commission of the predicate act and the act's commission with gross negligence are separate elements, and there is no reasonable likelihood that a juror would believe that a finding on the second element also satisfied the third element. As a result, this claim fails.

3. The jury was properly instructed on reckless driving as a predicate offense.

Next, Castaneda-Longoria contends that reckless driving was an improper predicate offense on which to instruct the jury because reckless driving is "subsumed" by gross vehicular manslaughter. He appears to claim that driving with gross negligence necessarily establishes driving with " 'willful and wanton disregard for the safety' of others" under Vehicle Code 23103, subdivision (a), so that the prosecution was effectively relieved of proving one of the elements of gross vehicular manslaughter. We disagree.

The only decision on which Castaneda-Longoria relies involved instruction on a predicate offense that was a lesser included offense of the crime charged. In *People v. Diaz* (2005) 125 Cal.App.4th 1484 (*Diaz*), the Second District Court of Appeal held that it was erroneous to instruct the jury on failure to yield to an emergency vehicle under Vehicle Code section 21806 as a predicate offense for establishing flight from a peace officer with willful or wanton disregard for safety under Vehicle Code section 2800.2, subdivision (a). (*Diaz*, at pp. 1486-1487.) A willful or wanton disregard for safety can be established by showing that three or more traffic violations occur during flight (Veh. Code, § 2800.2, subd. (b)), and the appellate court agreed with the defendant that use of the failure-to-yield offense as one of those three violations "impermissibly reduce[d] the prosecutor's burden of proof with respect to the element of willful or wanton disregard for safety from three violations to two violations," because it was "impossible to violate [Vehicle Code] section 2800.2[, subdivision (a)] without also violating [Vehicle Code] section 21806." (*Diaz*, at pp. 1490-1491.)

Diaz does not aid Castaneda-Longoria, because reckless driving requires a more culpable mind state than does gross vehicular manslaughter. "Gross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences" of one's acts and is evaluated under an objective, reasonable-person standard. (*Bennett, supra*, 54 Cal.3d at p. 1036.) The "willful or wanton disregard for safety" needed to prove reckless driving under the statute, however, requires that the defendant subjectively realized the likelihood of injury to another and intentionally disregarded that risk. (*People v. Schumacher*, *supra*, 194 Cal.App.2d at p. 340; see also *People v. Dewey* (1996) 42 Cal.App.4th 216, 221.) Thus, "more than negligence, even if the negligence be gross in nature, must be shown if reckless driving is to be established." (*Schumacher*, at p. 339.) As a result, the instruction on reckless driving as a predicate offense did not relieve the prosecution of its burden of proving a violation of a separate law.

4. CALCRIM No. 592's definition of gross negligence is not misleading.

Finally, Castaneda-Longoria claims that CALCRIM No. 592's definition of gross negligence is overbroad and misleading and lowered the prosecution's burden of proof in violation of his due process rights. We are not persuaded.

The jury was instructed under CALCRIM No. 592 on the definition of gross negligence as follows: "Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when: [¶] 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; [¶] AND [¶] 2. A reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with gross negligence when the way he or she acts is so different from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act."

Castaneda-Longoria argues that although CALCRIM No. 592 correctly defines gross negligence as "act[ing] in a reckless way that creates a high risk of death or great bodily injury," the given instruction "quickly watered[]down" the prosecution's burden of proof by stating that "gross negligence was shown not only when the defendant's actions show 'disregard for human life,' but also if his actions showed 'indifference to the consequences of his act,' not indifference to the consequences to another's life." Thus, he claims, the jury was permitted to find gross negligence based on indifference to *any* consequence, such as "property damage . . . [or] annoyance to neighbors," not just the consequence of risk to human life.

Again, we conclude there is no reasonable likelihood that a juror would interpret the challenged portion of CALCRIM No. 592 in the way Castaneda-Longoria suggests. The instruction unambiguously required a finding that he "act[ed] in a reckless way" that a reasonable person would have known "create[d] a high risk of death or great bodily injury," and "indifference to the consequences of that act" therefore referred to the consequences of an act posing a threat to human life. Given the focus on the grossly

negligent act's dangerousness to other people, we cannot agree with Castaneda-Longoria that "the trial court erroneously expanded the risks that [the] jury could consider" in determining if he was guilty of gross vehicular manslaughter. No reasonable juror would have understood that gross negligence could be premised on Castaneda-Longoria's indifference to consequences other than danger to human life. This claim of instructional error also fails.

F. There Was No Cumulative Trial Error.

Castaneda-Longoria also claims that reversal is required because the evidentiary and instructional errors he has identified were collectively prejudicial. As to most of his claims, we have concluded that there was no error. To the extent that the police officer's testimony that spinning doughnuts constituted reckless driving was improper, the error does not justify reversal for the reasons given. We therefore reject this claim of cumulative error.

G. Sufficient Evidence Was Presented to Establish a Violation of the Basic Speed Law.

Castaneda-Longoria argues that the conviction for gross vehicular manslaughter must be reversed because there was insufficient evidence of speeding, one of the predicate offenses on which the jury could have relied. To evaluate this claim, " 'we review the whole record to determine whether . . . [there is] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.' " (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

Speeding was charged as a predicate offense under Vehicle Code section 22350, which provides: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." Thus, a motorist violates the statute by "driving at a speed

greater than is reasonable or prudent, or at a speed which endangers the safety of persons or property." (*People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 (*Ellis*).)

Castaneda-Longoria contends that evidence of speeding was lacking because the prosecution failed to establish his "speed at the time of the accident." Although "the most common understanding people have of speeding is driving faster than the posted speed limit," Castaneda-Longoria was not prosecuted "on a theory that he was driving faster than the maximum posted speed limit, since there was no . . . meaningful evidence of [his] exact speed at the time of the accident." (*Ellis*, *supra*, 69 Cal.App.4th at p. 1339.) Rather, he was prosecuted based on a violation of "the basic speed law," which does not require proof that a motorist was traveling at any particular speed. (*Ibid.*)

Even assuming that there might be situations in which a driver could spin doughnuts at a "reasonable or prudent" speed without endangering the safety of people or property (*Ellis*, *supra*, 69 Cal.App.4th at p. 1339), we conclude there was sufficient evidence that Castaneda-Longoria was driving at a speed that was higher than reasonable or prudent under the circumstances within the meaning of Vehicle Code section 22350. He was spinning doughnuts in a residential neighborhood during commuting hours fast enough that he was unable to avoid Hudson, and he hit Hudson hard enough to knock off Hudson's hat and one of his shoes. Although it is true, as Castaneda-Longoria argues, that a fatal accident alone does not automatically establish a driver was speeding, the jury could reasonably rely on Hudson's death to infer that Castaneda-Longoria was traveling at a speed endangering human safety. We conclude that there was substantial evidence that Castaneda-Longoria committed this predicate violation.

H. No Sentencing Error Appears Except in the Order for Victim Restitution.

Castaneda-Longoria makes numerous claims of sentencing error. We agree with him that the order for $18,750 in victim restitution to Hudson's parents lacked supporting evidence and must be reversed, but we otherwise reject his claims.

1. The trial court correctly found Castaneda-Longoria presumptively ineligible for probation.

Castaneda-Longoria first claims that the trial court erred by determining that he was presumptively ineligible for probation under section 1203, subdivision (e)(2) and (3). We conclude that the court properly found him ineligible under the former provision based on his use of his vehicle as a deadly weapon, and we therefore do not address whether he was also ineligible under the latter provision.

Castaneda-Longoria requested that the trial court grant him probation, and the prosecution responded that he was presumptively ineligible for probation because he used a deadly weapon upon a human being and willfully inflicted great bodily injury. The court denied probation, agreeing that Castaneda-Longoria was presumptively ineligible due to "the use of a deadly weapon" and "the death of the victim due to the conscious[,] willful, reckless driving of the defendant" and finding that no unusual circumstances otherwise justified probation.

Section 1203 provides that "[e]xcept in unusual cases where the interests of justice would be best served if the person is granted probation, probation shall not be granted" in specified circumstances. (§ 1203, subd. (e).) As relevant here, a defendant is presumptively ineligible for probation if he or she "used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted." (§ 1203, subd. (e)(2).) A sentencing court has broad discretion to determine whether a defendant is eligible for probation, including whether "unusual" circumstances justify probation in the interests of justice, but we review de novo whether the trial court correctly found Castaneda-Longoria presumptively ineligible on the statutory basis given. (*People v. Nuno* (2018) 26 Cal.App.5th 43, 49-50 (*Nuno*).)

Castaneda-Longoria argues that section 1203, subdivision (e)(2) does not apply because he did not intend to use his truck as a deadly weapon. As he correctly observes, there are two categories of deadly weapons: those that are deadly weapons as a matter of law because they are designed for use as such, and those that are not inherently deadly but " ' "may be used, under certain circumstances, in a manner likely to produce death or

great bodily injury." ' " (*Nuno, supra,* 26 Cal.App.5th at p. 51.) "A vehicle falls within the second category and may qualify as a deadly weapon depending on how it is used" (*id.* at pp. 51-52), although "[t]he fact that the fatal wound was inflicted by a deadly weapon does not compel the conclusion, as a matter of law, that [the] defendant was 'using' the weapon" within the meaning of section 1203. (*People v. Southack* (1952) 39 Cal.2d 578, 591 (*Southack*).)

Some of the cases on which Castaneda-Longoria relies are inapposite because they involved weapons not actually used in a deadly manner. In *People v. Reid* (1982) 133 Cal.App.3d 354, the Fifth District Court of Appeal agreed with the defendant that sentencing enhancements for use of a deadly weapon during a series of robberies had to be stricken because they were based on his brandishing of a toy gun. (*Id.* at pp. 359, 364-365.) Although the toy gun was capable of being used in a deadly manner, such as to club someone, and although the defendant had used it during the robberies, it could not "be 'fairly inferred from the evidence' that [he] intended to use the gun as a club should the circumstances require." (*Id.* at p. 365, italics omitted.) Similarly, in *People v. Godwin* (1996) 50 Cal.App.4th 1562, the Second District Court of Appeal reversed enhancements for use of a deadly weapon during two robberies, based on the defendant's display of a starter pistol. (*Id.* at pp. 1565-1567, 1574-1575.) The starter pistol "was never shown to be capable of being used in the similar fashion to a firearm so as to be a deadly or dangerous weapon as a matter of law," and "[t]here was no evidence [the defendant] intended to use [it] as a bludgeon, although it could be used as such." (*Id.* at p. 1574.) Thus, the *Reid* and *Godwin* defendants' intent was relevant to whether the weapons at issue were used *in a deadly manner*, not whether they had been "used." Here, in contrast, it is undisputed that Castaneda-Longoria employed his vehicle in a deadly manner.

Castaneda-Longoria also argues that a weapon is not "used" within the meaning of section 1203, subdivision (e)(2) "if the fatal wound was inflicted negligently, as opposed to intentionally." In *Southack*, the defendant was convicted of manslaughter after shooting his son-in-law, and the trial court, assuming the conviction was for voluntary

manslaughter, found the defendant ineligible for probation because he had " 'used or attempted to use a deadly weapon upon a human being' " under former section 1203. (*Southack*, *supra*, 39 Cal.2d at p. 581.) But it also was possible "under the evidence and the instructions" that the defendant was convicted of involuntary manslaughter, either on a finding that he "unlawfully exhibited the gun in an angry manner" or that he "was simply holding the gun but . . . was negligent in so doing." (*Id.* at pp. 584, 591.) And since there was "evidence from which it could be inferred that [the] defendant . . . merely held [the gun] without due caution," which would not constitute using it upon a person, the Supreme Court remanded for the trial court to consider whether to grant probation. (*Id.* at pp. 591-592.)

Subsequently, the Supreme Court extended *Southack*'s reasoning in a case where the defendant shot the victim "due to unconscious neurotic factors." (*People v. Alotis* (1964) 60 Cal.2d 698, 706-707.) Based on "ample evidence that there was an absence of the intent to kill—that is, that the shooting was involuntary and nonvolitional," the Court determined that the defendant had not used a deadly weapon within the meaning of former section 1203. (*Alotis*, at p. 707.) As the Court later summarized, "*Southack* and *Alotis* hold that a negligent or involuntary act in discharging a firearm not otherwise being used on a human being does not constitute a use within the meaning of section 1203." (*People v. Chambers* (1972) 7 Cal.3d 666, 674.)

The *Southack* line of cases supports Castaneda-Longoria's claim only to the extent the evidence here establishes that his initial hitting of Hudson was unintentional. Having knocked the other man to the ground, however, Castaneda-Longoria then dragged him several feet and ran over him in the course of fleeing the scene, actions that the jury found separately inflicted great bodily injury on Hudson. Thus, even if it could be said that Castaneda-Longoria did not "use" his vehicle as a deadly weapon in committing gross vehicular manslaughter, there was plenty of evidence that he used it as such in committing the crime of fleeing the scene. (Cf. *Nuno*, *supra*, 26 Cal.App.5th at p. 52 [recognizing possibility that vehicle may be used as deadly weapon in fleeing scene, not just hitting victim].) And although Castaneda-Longoria implies otherwise, section 1203,

subdivision (e)(2) does not require an intent to injure or kill the victim: the brandishing of a deadly weapon qualifies, even if no injury results or the resulting injury was unintentionally inflicted. (See *People v. Chambers*, *supra*, 7 Cal.3d at p. 674.) In sum, we conclude that the trial court properly found Castaneda-Longoria presumptively ineligible for probation.

2. The trial court did not err by imposing the aggravated term for gross vehicular manslaughter.

Castaneda-Longoria also claims that the trial court relied on improper factors in sentencing him to the upper term of six years in prison for gross vehicular manslaughter. He is incorrect.

At sentencing, the trial court identified two mitigating factors, Castaneda-Longoria's "relative youth" and lack of criminal history, and two aggravating factors. The first aggravating factor, which the court gave "great weight," was that "[t]he crime involved great violence, death of a victim, and a high degree of callousness." The court explained:

> That particular factor resonates painfully with the Court. As [the prosecutor] described, the evidence in this case showed that the defendant drove, hit Mr. Timothy Hudson, dragged him, and drove over him.
>
> But what I remember painfully from the hearing was the evidence that Mr. Hudson was found naked because his clothes had been shredded off of him by the force of the dragging.
>
> And what the Court remembers from the evidence is that Mr. Castaneda-Longoria, having had ample opportunity to see and understand what he had done, because of the size of Mr. Hudson, and the driving over the body, left a man to die in the road.

The second aggravating factor was that Hudson "was a vulnerable victim in as much as this was a pedestrian versus vehicle encounter."

"When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the [trial] court." (§ 1170, subd. (b).) We review a court's selection of the lower, middle, or upper term for an abuse of discretion. (*People v. Sandoval* (2007)

41 Cal.4th 825, 847.) "[A] trial court will abuse its discretion . . . if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Ibid.*) Although California Rules of Court, rule 4.421[8] lists examples of aggravating factors, the list "is not exhaustive and does not prohibit a trial judge from using additional criteria reasonably related to the decision being made." (Rule 4.408(a).) A single aggravating factor is sufficient to support imposition of the upper term. (*People v. Steele* (2000) 83 Cal.App.4th 212, 226.)

Castaneda-Longoria claims that "neither aggravating factor applied under the facts here." First, he challenges the trial court's finding of an aggravating factor under rule 4.421(a)(1), which applies when "[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." It is true that it is improper to rely on the fact of death *alone* as an aggravating factor in imposing a term for vehicular manslaughter, since the victim's death is an element of that crime. (Rule 4.420(d); *People v. McNiece* (1986) 181 Cal.App.3d 1048, 1059, disapproved on other grounds in *People v. McFarland* (1989) 47 Cal.3d 798, 804-805.) Thus, had the trial court found an aggravating factor based on Hudson's death alone, we would agree with Castaneda-Longoria that it erred.

But the trial court did not rely on just Hudson's death. It also relied on the "great violence" and "high degree of callousness" involved in the crime. We agree with Castaneda-Longoria that some degree of callousness is involved any time a defendant commits gross vehicular manslaughter, because both callousness under rule 4.421(a)(1) and gross negligence involve conscious indifference to the consequences of one's actions. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1171 [defining "gross negligence"]; *People v. Esquibel* (2008) 166 Cal.App.4th 539, 558 [defining "callous"].) We cannot agree, however, that the callousness the court relied on was effectively an element of the crime or that the facts here do not "distinguish this crime from other vehicular manslaughters committed with gross negligence." In his haste to get away after initially

[8] All further rule references are to the California Rules of Court.

hitting Hudson, Castaneda-Longoria dragged the other man several feet and then ran over him, inflicting severe injuries without which he might have survived. These facts were sufficient to justify the court's finding.

Castaneda-Longoria claims that the trial court also erred by relying on the victim's vulnerability as an aggravating factor under rule 4.421(a)(3), which applies when "[t]he victim [is] particularly vulnerable," because Hudson was "no more vulnerable than any other pedestrian." " '[A] "particularly vulnerable" victim [must be] one who is vulnerable "in a special or unusual degree, to an extent greater than in other cases" ' " involving the same crime. (*People v. Piceno* (1987) 195 Cal.App.3d 1353, 1358.) Thus, Castaneda-Longoria is correct that the court's finding of vulnerability was improper to the extent it was based solely on the fact that the crime involved "a pedestrian versus vehicle encounter." But he fails to demonstrate any prejudice, given our conclusion that the court properly found a separate aggravating factor, particularly since the court gave that factor "great weight." (See *People v. Steele*, *supra*, 83 Cal.App.4th at p. 226.) We conclude that the court did not abuse its discretion in imposing the upper term for gross vehicular manslaughter.

3. The trial court did not have discretion under section 1385 to strike the punishment for the enhancement for fleeing the scene.

Castaneda-Longoria also argues that the trial court mistakenly believed it had no discretion to strike the punishment for the sentencing enhancement under Vehicle Code section 20001, subdivision (c) (section 20001(c)) for fleeing the scene of a gross vehicular manslaughter. The court accurately perceived it had no such discretion.

The prosecution argued that the statutory language required the challenged enhancement to be imposed and prevented it from being stayed. Castaneda-Longoria did not argue otherwise, and the trial court imposed a consecutive five-year term for the enhancement without comment.

Under section 20001(c), "[a] person who flees the scene of the crime" after committing gross vehicular manslaughter "shall be punished by an additional term of imprisonment of five years in the state prison. . . . The court shall not strike a finding that

brings a person within the provisions of this subdivision or an allegation made pursuant to this subdivision." Section 1385 authorizes a sentencing court to, "in furtherance of justice, order an action to be dismissed," which includes the power to strike or dismiss a sentencing enhancement or strike the additional punishment for that enhancement. (§ 1385, subds. (a), (b); *People v. Meloney* (2003) 30 Cal.4th 1145, 1155.)

" '[A]bsent a clear legislative direction to the contrary, a trial court retains its authority under section 1385 to strike an enhancement.' " (*People v. Meloney*, *supra*, 30 Cal.4th at p. 1155.) The "clear expression of intent may be found either in the relevant statutory language or in the statute's legislative or initiative history." (*People v. Fuentes* (2016) 1 Cal.5th 218, 227 (*Fuentes*).) Although "there must be ' "a clear legislative direction" ' eliminating the trial court's section 1385 authority[,] . . . 'it is not necessary that the Legislature expressly refer to section 1385 in order to preclude its operation.' " (*Id.* at p. 226.) We review this issue of statutory interpretation de novo. (See *People v. Blackburn* (2015) 61 Cal.4th 1113, 1123.)

Castaneda-Longoria appears to concede that under the plain terms of section 20001(c), the trial court did not have discretion to strike or dismiss the challenged enhancement. He argues that nevertheless, the court had discretion to strike the additional punishment for it, which he refers to as "staying" the punishment. (See *People v. Calhoun* (1983) 141 Cal.App.3d 117, 126 [distinguishing between striking and staying in enhancement context].) But section 1385, subdivision (b)(2) unambiguously provides that a trial court may not "strike the additional punishment for any enhancement that cannot be stricken or dismissed." We conclude that this provision, in combination with section 20001(c)'s explicit prohibition on striking the challenged enhancement, establishes a clear legislative intent to eliminate a court's section 1385 discretion to strike the punishment for a section 20001(c) enhancement.

Attempting to get around section 1385, subdivision (b)(2), Castaneda-Longoria points to the provision's legislative history. The legislative history reveals that when it amended section 1385 in 2000 to add what is now subdivision (b), the Legislature understood the new provision as confirming a trial court's already-existing power to

strike the punishment for an enhancement. (*Fuentes*, *supra*, 1 Cal.5th at p. 228; Stats. 2000, ch. 689, § 3; see Stats. 2018, ch. 1013, § 2.) Castaneda-Longoria reasons that because the Legislature understood this power to exist when section 20001(c) was enacted in 1996, that provision's omission of any explicit reference to striking the *punishment* for the fleeing-the-scene enhancement signifies that sentencing courts retain discretion to do so under section 1385 even though they do not have discretion to strike or dismiss the enhancement itself. This position might have had some merit before 2000, but Castaneda-Longoria does not explain how the Legislature's subsequent enactment of section 1385, subdivision (b)(2) could possibly be read to preserve the ability to strike the punishment for an enhancement under section 20001(c). As a result, we reject his claim.

4. Castaneda-Longoria's accrual of conduct credits was properly limited.

Castaneda-Longoria also contends that the trial court erred by limiting his conduct credits to 15 percent under section 2933.1, based on the jury's finding that he inflicted great bodily injury during the hit and run. We are not persuaded.

Section 2933.1 provides that any person convicted of a violent felony specified under section 667.5, subdivision (c) "shall accrue no more than 15 percent of worktime credit" under section 2933. (§ 2933.1, subd. (a).) In turn, under section 667.5, subdivision (c)(8), "[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7" qualifies as a violent felony. Here, the jury found true under section 12022.7, subdivision (a) the allegation that Castaneda-Longoria personally inflicted great bodily injury on Hudson in the commission of hit-and-run driving.

Castaneda-Longoria does not contest that, based on the jury's finding, the 15 percent limitation was required. Instead, he appears to claim that insufficient evidence supported the finding. In reviewing this claim, we again " 'determine whether . . . [there is] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support

of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.' " (*People v. Manibusan, supra,* 58 Cal.4th at p. 87.)

Castaneda-Longoria relies on *People v. Valdez* (2010) 189 Cal.App.4th 82 (*Valdez*), in which the Fourth District Court of Appeal reversed a great-bodily-injury finding under section 12022.7 that accompanied a conviction for hit-and-run driving because "the injuries suffered in the accident [were] . . . not aggravated in any manner by [the] defendant's failure to thereafter stop and render assistance." (*Valdez,* at pp. 84-85.) In reaching this conclusion, the *Valdez* court was careful to emphasize that its holding did not mean that "a great bodily injury allegation may never attach to a violation of [Vehicle Code] section 20001, subdivision (a)." (*Id.* at p. 90.) Rather, such a finding could stand "when the injury was caused or aggravated by the defendant's failure to stop and render aid," including if, in "flee[ing] the scene of one injury accident," the defendant "cause[d] [a second] accident resulting in great bodily injury." (*Ibid.*)

If anything, *Valdez* supports the jury's finding in this case. Instead of stopping and rendering aid to Hudson after hitting him, Castaneda-Longoria dragged him and ran him over while fleeing the scene. Castaneda-Longoria contends that "[t]here was no evidence that if [he] had tried to stop, given the pickup was moving when the accident occurred, Mr. Hudson's injuries would have been reduced in any meaningful manner," which is simply untrue. The forensic pathologist specifically agreed that Hudson's injuries were "aggravated" by the "actual dragging and the running over" after the initial contact with the truck. Indeed, the pathologist testified that the most severe injury Hudson sustained, the damage to his liver, was caused by being run over. In short, there was ample evidence to support the jury's finding of great bodily injury under section 12022.7, and the trial court properly limited Castaneda-Longoria's conduct credits to 15 percent.

5. Castaneda-Longoria is not entitled to relief based on any prosecutorial misconduct at the sentencing stage.

Next, Castaneda-Longoria claims that the prosecutor engaged in misconduct by referring to plea negotiations in the People's sentencing brief. He argues that the

prosecutor "in effect argued [he] should receive a longer sentence" than the one he was earlier offered "because he had asserted his constitutional right to a jury trial," requiring a new sentencing hearing conducted by a different judge. We conclude that even if the prosecutor's conduct was improper, it was harmless.

In the sentencing brief, the prosecutor wrote that "during pre-preliminary hearing negotiations . . . , the People offered the defendant 7 years state prison for a plea to [gross vehicular manslaughter] and the enhancement," and "[t]he case was pre-tried in front of [another judge], who refused to offer less than the People's pre-preliminary hearing offer at that time. It is noteworthy that this offer was made in order to encourage early resolution of the case and to avoid the next of kin having to re-live this tragic offense during preliminary hearing and trial. This offer was also made before the People obtained the photographs from the [January 2014 crash], and before the People realized that the defendant had also previously been convicted of speeding . . . , receiving a hefty fine and a license suspension." The prosecutor asked that Castaneda-Longoria receive the maximum sentence of 11 years for gross vehicular manslaughter and the accompanying enhancement but did not refer to the plea negotiations in making her arguments. In imposing the sentence, the trial court specifically stated that it was "not considering . . . pretrial plea bargain offers."

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the [proceedings] with unfairness as to make the resulting conviction [or sentence] a denial of due process." ' " (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

We agree with Castaneda-Longoria that the prosecutor's conduct was improper to the extent her reference to his rejection of a seven-year deal was an attempt to influence the trial court to impose the aggravated term. A sentencing court cannot rely on a defendant's exercise of the right to a jury trial to impose an aggravated term. (*People v. Colds* (1981) 125 Cal.App.3d 860, 863, cited with approval in *People v. Sandoval*, *supra*, 41 Cal.4th at p. 847.) We need not determine whether the prosecutor's discussion rose to the level of misconduct, however, because Castaneda-Longoria has utterly failed to show prejudice as required. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1019.) He makes the cursory assertion that the prosecutor's statements "tainted the sentencing hearing" and, "once introduced, could not be erased." But in sentencing him, the court disclaimed any reliance on the parties' plea negotiations and, as we have said, there was at least one other aggravating factor on which it properly relied to impose the upper term. Castaneda-Longoria is not entitled to a new sentencing hearing.

6. Castaneda-Longoria is not entitled to relief based on the trial court's discussion of his silence during the probation interview.

Castaneda-Longoria also contends that the trial court erred by holding against him "his silence in not discussing the crime with the Probation Officer," requiring a new sentencing hearing. We disagree.

At the sentencing hearing, the prosecutor argued that Castaneda-Longoria's "lack of remorse" was an aggravating factor supporting the imposition of the upper term for gross vehicular manslaughter. In doing so, she "encourage[d] the Court to look at the probation report," which reflected "that probation was unable to ascertain any sense of responsibility or remorse from the defendant in the instant offense." In the report, the probation interviewer stated she had not spoken to Castaneda-Longoria about "the instant offense at the request of [his] attorney."

In response to the prosecutor, Castaneda-Longoria's trial counsel stated that although he had asked the probation interviewer not to discuss the facts of the offenses with his client, he had also requested that she "ask whatever she felt about his remorse or any of his social history." The trial court asked counsel why he had not allowed his client

to speak about the facts with the probation interviewer, stating, "I mean, it's not a 5th Amendment issue. He has been convicted." Counsel stated that the Fifth Amendment right "carries through sentencing" and "[t]here could be an appeal," and he asked the court to "hold it against [him], not [his] client," if the court believed he had given Castaneda-Longoria "bad legal advice."

The trial court responded, "Well, I'm not holding it against anybody. But it does deprive your client of the opportunity to express remorse. He made a statement today, and I guess he had the opportunity to say what he wanted in that. [¶] But . . . , I've seen plenty of reports where convicted persons did talk about the incident, and they had not taken the stand. But, uhm, that's okay." The court did not identify lack of remorse as an aggravating factor when imposing the upper term for gross vehicular manslaughter.

Castaneda-Longoria is correct that a defendant's Fifth Amendment privilege against self-incrimination remains until a conviction becomes final, which includes the time prior to sentencing. (*People v. Conerly* (2009) 176 Cal.App.4th 240, 252; *People v. Fonseca* (1995) 36 Cal.App.4th 631, 635.) Even if the trial court misunderstood the privilege's applicability during the sentencing stage, however, Castaneda-Longoria again fails to demonstrate any prejudice resulting from that misunderstanding. The court stated that it was "not holding it against anybody" that Castaneda-Longoria had been advised not to discuss his crimes with the probation interviewer, and it did not rely on a lack of remorse as an aggravating factor. Therefore, a new sentencing hearing is unnecessary.

7. The order for victim restitution lacks supporting evidence.

Castaneda-Longoria also argues that the trial court erred by awarding restitution to Hudson's elderly parents to compensate for the loss of Hudson's caretaking services, even though there was no request for restitution or evidence presented about the extent of the loss. We agree that there was no competent evidence to support the order of victim restitution, and we therefore reverse it.

The probation report requested that $100,000 be paid to Hudson's mother, "who will return it to the defendant's insurance company who paid her for the death of her son." The report stated that "the total monetary loss [Hudson's death] caused his

parents" was "unknown," although it also noted that Hudson "was the primary caretaker for his elderly parents" so "the degree of monetary loss could be significant and more than $100,000." At the sentencing hearing, Hudson's mother indicated that he assisted his parents in several ways, including by helping with their serious medical needs and doing yard work and repairs.

The prosecutor argued at the sentencing hearing that no mitigating circumstance could be found based on payment of restitution because Castaneda-Longoria had not "made any restitution." The trial court pointed out that his parents' insurance company had paid $100,000 to Hudson's parents, and the prosecutor responded that based on Hudson's caretaking services and his life expectancy, "[t]he value to that family is far in excess of a hundred thousand dollars in terms of their monetary loss. Gosh, you can't even really put a figure on it, and it seems grotesque to do so." The prosecutor then requested that restitution "be set [at] something commensurate so [Castaneda-Longoria] . . . doesn't end up with some windfall later if he wins a lottery, or once he finally gets a job, or once he goes to prison and he's working, trying to get conduct credits, that money should go back to the Hudsons. Should he ever inherit, that money should go back to the Hudsons."

In pronouncing the sentence, the trial court decided, over the prosecutor's objection, that it could not order restitution that would "replicate" the insurance payment. The court then addressed the issue of restitution for the loss of Hudson's caretaking services as follows:

> [T]here's no particular showing about restitution owing for the role that Mr. Hudson played in taking care of his parents. [¶] And on the one hand, they were not paying him. On the other hand, he performed services that now, in order to replace, they would have to pay someone.
>
> And it is difficult for the Court to make estimates about Mr. Timothy Hudson's life expectancy, or things like that. However, I'm going [to] make a calculation on the record, and I think it's a reasonable one.
>
> I think that, at a minimum, it seems that Mr. Timothy Hudson was taking the place of a caregiver. If it was a daily caregiver—and I've had

> elder care issues in my family—a daily caregiver for 12 hours a day is $125. 24 hours, round the clock care, can run as high as $250 a day. I think that's the high end, and that would not be reasonable.
>
> But I think, at a minimum, he was running errands, and being there, and basically providing the services of two half days or one day, and so I'm going to make a calculation of $75 a day, once a week, 50 weeks, for five years. I think that's a reasonable amount of restitution.
>
> And I would note that this was not specifically requested in terms of the probation report. It was requested in [the prosecutor's] argument, but without particular numbers. So I'm fashioning, I think, what is a reasonable estimate based on the relative paucity of information.

In total, the court awarded $18,750 to Hudson's parents for "the loss of their caregiver services that [Hudson] provided."

With exceptions that are not relevant here, "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the [sentencing] court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) "To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct." (§ 1202.4, subd. (f)(3).)

Castaneda-Longoria does not dispute that the loss of Hudson's caretaking services is an appropriate category of economic loss for which Hudson's parents can receive restitution. Instead, he argues that "[t]here was no 'adequate factual basis for the claim.' " (Quoting *People v. Giordano* (2007) 42 Cal.4th 644, 664 (*Giordano*).) "A restitution order is reviewed for abuse of discretion and will not be reversed unless it is arbitrary or capricious. [Citation.] No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered. ' "[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt." ' . . . Once . . . a prima facie showing of economic losses incurred as a

result of the defendant's criminal acts [is made], the burden shifts to the defendant to disprove the amount of losses claimed." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542-1543 (*Gemelli*).)

The Attorney General correctly observes that "[a] victim's request . . . is not a predicate for restitution" because under section 1202.4, subdivision (f), " 'the amount of restitution may be based either on the "amount of loss claimed by the victim or victims" *or* "any other showing to the court." ' " (See *People v. Selivanov* (2016) 5 Cal.App.5th 726, 784-785.) But there was no such alternative showing here. Although section 1202.4 "does not, by its terms, require any particular kind of proof" (*Gemelli*, *supra*, 161 Cal.App.4th at pp. 1542-1543), the statute cannot be read to authorize a restitution award based only on figures derived from the trial court's own experience.

We are also troubled by the lack of process afforded to Castaneda-Longoria on this issue. The probation report may have given him notice that restitution for the loss of Hudson's caretaking services was sought, but no actual figure was proposed until the trial court performed its calculation in the midst of imposing the sentence. A "defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution" and rebut a prima facie showing of loss. (§ 1202.4, subd. (f)(1); *Gemelli*, *supra*, 161 Cal.App.4th at p. 1543.) But no prima facie showing of the loss was ever presented, and Castaneda-Longoria was not given "a reasonable opportunity to challenge the accuracy/validity of the restitution order which was made." (*People v. Resendez* (1993) 12 Cal.App.4th 98, 114.)

We recognize that in *Giordano*, which also involved future economic losses, our state Supreme Court determined that "the trial court's methodological imprecision" in calculating the award did not require reversal because the defendant had failed to show that an alternative method would have resulted in a lesser award. (*Giordano*, *supra*, 42 Cal.4th at p. 666.) Here, however, Castaneda-Longoria had no opportunity to present any evidence to dispute the amount of restitution before it was awarded, and we are unable to determine whether the court's calculation might have been reduced had he done so. As a result, we conclude that the victim restitution order must be reversed.

8. There is no reason to vacate the sentence.

Finally, Castaneda-Longoria claims that the sentence must be vacated because the trial court "imposed the maximum possible sentence on [him] through a series of legal errors that skewed the exercise of the court's sentencing discretion." He does not identify any errors beyond those already discussed, and to the extent this argument is one of cumulative error, we reject it. As discussed above, the court relied on a proper aggravating factor to impose the maximum term for gross vehicular manslaughter, and it did not rely on other factors that Castaneda-Longoria contends were improperly presented. This claim fails.

III.
DISPOSITION

The order awarding $18,750 to Hudson's parents as victim restitution is reversed, and the matter is remanded for further proceedings on the amount of restitution owed for the loss of Hudson's caretaking services. The judgment is otherwise affirmed.

_____

Humes, P.J.

We concur:

_____

Margulies, J.

_____

Banke, J.